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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL, ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.
Respondents,

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC., ET AL.,
Respondents.

BRIEF OF THE PETITIONERS

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BRIEF OF THE PETITIONERS

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on June 27, 1978.

OPINION BELOW

The opinion below was rendered upon a Writ of Prohibition by the West Virginia Supreme Court of Appeals and the case is unofficially reported in 248 S.E.

2d 269 (1978). The opinion is set forth in full in the Appendix of the Brief for Respondents Daily Mail Publishing Co., et al., in opposition.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on June 27, 1978 and the Appellate Term of the Court below ended on July 14, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

West Virginia Code 49-7-3:

> "Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application."

QUESTION PRESENTED

The sole question to be considered herein is whether West Virginia Code 49-7-3 creates a prior restraint on the freedom of the press and, therefore, is violative of the First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On the morning of Thursday, February 9, 1978, there occurred a shooting at Hayes Junior High School in St. Albans, West Virginia. The alleged assailant was a fourteen year old student, who was taken into custody and at a hearing in the Circuit Court of Kanawha County later that day was adjudged a delinquent. On the morning of February 10, 1978, a story appeared on the front page of the "Charleston Gazette" by Leslie H. Milam, Reporter, naming the alleged assailant in violation of West Virginia Code 49-7-3. Said statute forbids the publication of the name of a child in connection with any proceeding in a newspaper without a written order of the Court. In the same issue an editorial appeared on the editorial page of that paper written by Don Marsh, editor, which read in full as follows:

> "Elsewhere in this edition of the Gazette is a story about the shooting death Thursday of a ninth grade student at Hayes Junior High School in St.

Albans. The story says that Stewart Perrock, 14, a fellow student, has been arrested.

It is against the law to publish names of juveniles charged with crimes in West Virginia. When we decided to use Perrock's name, we decided to break the law.

Nelson Sorah, the city editor, asked the most disturbing question. What gives us the right to choose which law we will obey and which law we will ignore?

I'm not sure that there is an acceptable answer. My own feeling is that the public interest in being informed of acts of violence in schools outweighs the undesirability of breaking a law, particularly a bad one.

I know nothing of what went on between the two boys before the shooting. My instinct as a parent is that the tragedy is almost as great for the arrested boy as it is for the dead one.

On the other hand, I am not sure the interest of society is served by a law that limits the charge in the case to juvenile delinquency and the sentence to no more than four years—until the accused youth is 18. It is social work legislation. While I don't mean to use the St. Albans case as an example, the state juvenile statute is the kind of law that leaves juveniles almost immune from punishment in areas where youth crime is a serious problem.

This is no single answer to Sorah's question that fully explains the reason that we are using the name of the arrested boy. Perhaps the decision was shaded by the urge to report a story, any story, as fully as possible. (I understand that WCHS used the name early in the day and then removed it when someone there realized they might be doing something illegal). Perhaps those of us

who made the decision were influenced by a kind of scoop mentality that makes us want to rush into print with whatever we know. *Maybe the decision was simply wrong.*

But it is difficult for me to believe that printing the name can damage the youth or increase his problem. I am sure that everyone in the St. Albans area knows his name and what he is charged with doing. I think it is a legalistic fiction for us to limit ourselves to "a 14-year-old youth" or "the juvenile suspect," when we report on the youngster who is charged.

My opinion was part of the consensus to use the name. I think *one of the ground rules for those who violate a law should be that they are willing to pay whatever penalty is required.* As an example, I believe that reporters who don't want to reveal sources when judges require them to should be prepared to go to jail.

However, I think a very strong case can be made that the existing restrictions on printing the names of juveniles charged with crimes are unwise and possibly illegal. If it comes to it, the Gazette is willing to do whatever is necessary to have that belief tested as fully as the courts allow. (Emphasis Supplied).

Respondent, "The Charleston Daily Mail", published the juvenile's name in relation to the shooting in the February 10, 1978 edition of the newspaper. Thereafter, at the January 1978 Term of the Kanawha County Grand Jury, the respondents were indicted for misdemeanors for violating the above code section.

Both respondents filed petitions for a writ of prohibition with the Supreme Court of Appeals of West Virginia. On March 13, 1978, the Supreme Court issued a rule in prohibition making both cases return-

able on May 16, 1978. Thereafter, on June 27, 1978, the Court held that West Virginia Code 49-7-3 was unconstitutional as violative of the First Amendment to the Constitution of the United States because it created an impermissible prior restraint upon the freedom of the press.

It is from the judgment of the West Virginia Supreme Court of June 27, 1978, that petitioners sought review by writ of certiorari, which was granted on November 13, 1978. In the Brief for the Respondents Daily Mail Publishing Co., et al., In Opposition, it was stated that the record demonstrates that respondents obtained their information about the slaying, including the identity of the alleged assailant, from police officials and an assistant prosecuting attorney of Kanawha County. We can find nothing in the pleadings, record or exhibits that disclose that respondents received information concerning the slaying, including the identity of the alleged assailant from an assistant prosecuting attorney of Kanawha County.

ARGUMENT

West Virginia Code 49-7-3 Is Not Violative of the First Amendment to the Constitution of the United States in That It Does Not Create an Impermissible Prior Restraint on the Freedom of the Press

West Virginia Code 49-7-3 provides that with regard to any proceedings under that chapter, the name of a child shall not be published in any newspaper without an order of the court. Respondent newspapers deliberately violated the statute.

While this Court has discussed the issue of prior restraint on many occasions, the Court has never addressed the question under the facts presented. The

"public record" rationale of *Cox Broadcasting Company* v. *Cohn,* 420 U.S. 469 (1975), *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976) and *Oklahoma Publishing Company* v. *District Court,* ..... U.S. ....., 51 L. Ed. 2d 355 (1977), is not applicable here inasmuch as the child's name was not obtained from any public record or proceeding.

It is well established with this Court that First Amendment rights are not absolute, nor can prior restraints never be employed. *Nebraska Press Association,* supra. Petitioners submit that the effect of Code 49-7-3 upon the First Amendment freedoms of the press is relatively slight when considered in light of the interest that the statute seeks to protect, ie. a child's anonimity.

While not a decision by this Court, Petitioners would urge that the reasoning in the case of *Government of Virgin Islands* v. *Brodhurst,* 285 F.Supp. 831 (D. C. Virgin Islands, 1968) in which this issue was decided, be considered and adopted. There an appeal was taken by the publisher and managing editor of a newspaper who had been convicted and fined for violation of a statute which prohibited the publication of the name of a juvenile without an order from the court. The defendants argued that such a restraint was only permissible where a clear and present danger was involved and that publication of a juvenile's name in the newspaper was not a sufficient interest which would justify curtailing the liberty of the press. The Government responded that the legislature had acted within its power in providing that a child's welfare necessitated that they be cloaked with complete anonimity while subject to the court's jurisdiction. Moreover, the statute provided a means by which court authorization

would be obtained to permit publication of a child's name.

In discussing the issue of freedom of the press the court quoted from *In re Gault*, 387 U.S. 1, 25 (1967):

> "In any event, there is no reason why, consistently with due process, a state cannot continue, if it deems appropriate, to provide and to improve provision for confidentiality of records of police contacts and court action relating to juveniles."

This Court has not retreated from the above view. Petitioners in the case at bar contend that it follows that a provision to enforce compliance with the provisions for confidentiality may also be legislated.

The court in *Government of Virgin Islands*, supra, recognized that:

> "It is not easy to define the permissible limitations on the constitutional right or to derive from the decisions generally applicable standards. While it is settled that the constitutional rights of freedom of speech and of the press embrace the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment, it remains true that where the line is to be drawn in a particular case does not rest on generalities but rather on the concrete clash of particular interests and the community's relative evaluation, both of these interests and of how the one will be affected by a specific restriction and the other by its absence." (p. 837).

Quoting from *Thornhill* v. *State of Alabama*, 310 U.S. 88, 84 L. Ed. 1093 (1940), the Court further stated:

> "It is imperative that when the effective exercise of these rights is claimed to be abridged, the

> courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." (p. 837).

The Court then determined that:

> "Any attempt to restrict those liberties must be justified by a clear public interest, threatened not doubtfully or remotely, but by clear and present danger." (p. 837).

The Virgin Island Court held:

> "The 'clear and present danger' rule is not a mechanical test applicable in every case touching First Amendment freedoms, without regard to the context of its application." (p. 838).

Moreover, the court stated:

> ". . . when the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively slight and the public interest to be protected is substantial, *a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity.* When particular conduct is regulated in the interest of public order and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." (p. 838) (Emphasis supplied).

The Court then held that the advantages accomplished by the shielding of the names of juveniles from publicity out-weighed those gained by allowing the publication of the names of children. The limitation placed upon the press was justified in light of the interest of rehabilitating juvenile offenders.

Further, the court held that inasmuch as the defendants could have sought a court order to publish the juveniles' names, that the legislative intent was not an absolute prohibition, but it was properly left to the court's discretion as to whether the disclosure would serve any public interest.

In the case of *Oklahoma Publishing Company* v. *District Court of Oklahoma County, Oklahoma,* 555 P. 2d 1286 (Okla. 1976), the State Supreme Court discussed the advantages of having a juvenile's identity remain anonymous. An eleven year old boy was arrested and charged with delinquency because of the alleged commission of second degree murder. His name and picture were published by the petitioner, and subsequently the trial court issued an order enjoining the news media from using his name or picture. Petitioner then brought an action for writs of prohibition and mandamus.

Under the Oklahoma statute detention hearings are to be held in private unless the judge specifically orders the hearing to be held in public. 10 O.S. 1971 § 1111.

The Court presented the conflicting interests as follows:

> "The argument for requiring juvenile proceedings to be confidential is that: exposure of a juvenile's record of delinquency would be likely to cause impairment of rehabilitative goals of the juvenile correction procedures which might encourage the juvenile offender to commit further acts of delinquency; cause the juvenile offender to lose employment opportunities, or otherwise suffer unnecessarily; bring undue humiliation upon his family because of his youthful transgressions; and

> that publicity may afford the hard core delinquent the kind of recognition he desires. The argument for freedom of the press to report juvenile proceedings is that the press is the watchdog of society and that if they are precluded by statute from reporting a matter of public interest, soon any judicial proceeding could be made subject to private proceedings, and a return to the star chamber would inure as the direct result of denial of the right of press to unrestrainedly gather the news." (p. 1292)

The state court concluded that the restraint on the press in being precluded from publishing a juvenile's name was valid in light of the interest in the possible rehabilitation of the offender and his subsequent integration into society.

This Court reversed the Oklahoma Court on the ground that even though the trial judge had not specifically ordered the detention hearing to be open to the public, members of the press were in fact present at the hearing with the knowledge of the judge, the prosecutor and defense counsel, and no objection was made. Therefore, the Court held that the press could not be enjoined by a court order from publishing the juvenile's name and picture inasmuch as the name had been revealed during a "public" proceeding. *Oklahoma Publishing Company* v. *District Court,* 51 L. Ed. 2 355 (1977). The Oklahoma statute was not declared unconstitutional as being a prior restraint as was held by the West Virginia Supreme Court in this case.

Such is not the situation in the case at bar. The respondents did not obtain the youth's name from any public record or hearing. Nor was his name gotten by lawful means or with the State's approval. It was

obtained through their own investigation, and then, respondents flagrantly violated the law by publishing the juvenile's name and picture.

Petitioners assert that the reasoning set forth in *Oklahoma Publishing Company, supra,* by the Oklahoma Supreme Court regarding the balancing of the probable effects of the statute upon the right of the freedom of the press against the advantages accruing to the juvenile is applicable to the present case.

As previously stated, this Court has determined that a State in furtherance of its policy toward juveniles may provide for the confidentiality of proceedings and records of youthful offenders. *In re Gault,* 387 U.S. 1 (1967). At page 24 of the *Gault* opinion, Justice Fortas speaking for the Court recognized the unique nature of juvenile proceedings and stated "* * * it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.' "

This Court has decided other cases in which the Court noted that the unique nature of juvenile proceedings need not be destroyed when various due process safeguards are imposed on the juvenile court system. In *Kent* v. *United States,* 383 U.S. 541 (1966), the Court held that a juvenile must be afforded due process during transfer proceedings. The Court also stated:

> "The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is parens patriae rather than prosecuting attorney and judge." (pp. 554-555.)

Further, the Court held that under statutory schemes:

> "[t]he Juvenile Court is vested with 'original and exclusive jurisdiction' of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, *shielded from publicity.* He may be confined, but with rare exceptions he may not be jailed along with adults." (p. 556.) (Emphasis supplied.)

In *In re Winship,* 397 U.S. 358 (1970), this Court reiterated that it had no desire to change the juvenile system's basic premise of rehabilitating rather than imposing criminal sanctions. While imposing the further due process requirement that the burden of proof in a juvenile proceeding must be beyond a reasonable doubt, the Court again approved the confidentiality of juvenile proceedings. At page 366, the Court opined:

> "Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process. Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, *and that juvenile proceedings are confidential.*" (Emphasis supplied.)

In *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971) and *Breed* v. *Jones,* 421 U.S. 519 (1975), this Court

again recognized the uniqueness of the juvenile system and that its purpose was rehabilitation not to turn the proceedings into adversary battles.

As stated above, this Court has not reached the issue raised by the facts in the case at bar. In fact, this Court has expressly refrained from deciding questions involving state policy which denies the public and the press access to juvenile records. *Cox Broadcasting Corporation* v. *Cohn, supra; Nebraska Press Association* v. *Stuart, supra.* However, based upon the attitude of this Court as shown in the above-cited cases, petitioners submit that, while seeking to improve the juvenile system, the Court does not and should not desire to destroy any of the beneficial aspects of the juvenile system, such as shielding the child from publicity. The purpose of the juvenile system should be to rehabilitate.

Similar legislation regarding the nonpublication of a juvenile offender's name has been passed by Congress. 18 U.S.C.A. § 5038, reads in part:

> "(d) Unless a juvenile who is taken into custody is prosecuted as an adult * * *.
>
> "(2) Neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding."

Code 49-7-3 does not preclude the press from publishing the circumstances surrounding an event such as we have here. The statute states only that a child's name shall not be published. Therefore, the press can still be the watchdog of the system and report matters of public interest.

The State of West Virginia through the legislature and the courts has adopted a policy of rehabilitation for juveniles, and for the confidentiality of proceedings and record of youthful offenders. West Virginia Code 49-5-1 (d) and 49-7-1 (as amended 1977). In *State ex rel Harris* v. *Calendine,* 233 S. E. 2d 318 (W. Va. 1977), Justice Neely discussed at length the State's policy toward juveniles. Although the decision spoke of the rights of status offenders, comments found in the opinion apply to all juvenile offenders, especially in light of the 1977 Amendments to the juvenile law that a juvenile may no longer be transferred to adult court. It should be noted that should Code 49-7-3 be declared unconstitutional the press would be allowed to publish not only the names of those youths charged with delinquency because of the commission of violent criminal offenses, but also those charged with delinquency as status offenders. For example, a youth who has been habitually absent from school without good cause (Code 49-1-4(4), as amended 1977) could be proceeded against under Chapter 49 and his name published the newspaper. What public interest arises there? In balancing the interests between the freedom of the press and the juvenile's interest in anonimity, petitioners contend that clearly the juvenile's interest and the state's interest in protecting the youth outweigh the public's right to know the juvenile's name.

As Justice Neely stated in *Harris,* supra:

> "Furthermore, the status offender is inherently in a different class from the criminal offender. The Legislature could choose to punish children guilty of criminal conduct in the same manner as it punishes adults, but *as a matter of public policy* the Legislature provided instead for a comprehensive system of child welfare. *The aim of this sys-*

> *tem is to protect and rehabilitate children, not to punish them.*" (p. 325) (Emphasis Supplied).

Moreover,

> "Since the class to which status offenders belong has been created under authority of the State's inherent and sovereign parens patriae power, *Warner Bros. Pictures* v. *Brodel,* 179 P.2d 57 (Cal. App 1947); *Johnson* v. *State,* 18 N. J. 422, 114 A. 2d 1 (1955), and not under the plenary powers of the State to control criminals, *Barker* v. *People,* 2 Cow. (N.Y.) 686 (1824), status offenders must be treated in a fashion consistent with the parens patriae power, namely, they must be helped and not punished . . ." (p. 326).

When a newspaper publishes a child's name, regardless of the offense the notoriety which results therefrom would scar rather than scare, and, further, handicaps his prospects for future adjustment in society and acceptance by the public.

The West Virginia Supreme Court cited the case of *Landmark Communications, Inc.* v. *Commonwealth of Virginia,* —— U.S. ——, 56 L. Ed. 2d 1 (1978) for the proposition that the Virginia statute jeopardized free discussion and constituted an improper prior restraint. Petitioners contend that a close reading of *Landmark* reveals that the case was not decided on the issue of whether the statute created an impermissible prior restraint. In fact, this Court stated that that was not the issue, and more specifically, that the statute did not constitute a prior restraint.

Finally, and perhaps most importantly, Code 49-7-3 provides that a newspaper may publish a child's name upon obtaining an order from the Court. Therefore, petitioners assert that the statute does not impose an

absolute prohibition. The judge is the proper person to determine whether a child's name should be published, because he possesses the necessary legal expertise, and, as judge he has the duty to uphold the State's policy of protecting the juvenile for later rehabilitation.

Respondent submits that the effect of Code 49-7-3 upon the First Amendment freedoms of the press is relatively slight and the interest the statute seeks to protect is substantial. The press is usually more interested in events than in names and under West Virginia law no prohibition is placed upon the press as to the reporting of events, such as the shooting here.

CONCLUSION

For these reasons, petitioners pray that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia, and issue a mandate accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CLETUS B. HANLEY, one of Counsel for the Petitioners, and a member of the Bar of The Supreme Court of The United States, hereby certfiy that, on the 28th day of December, 1978, I served three copies of the foregoing Brief of Petitioners on each of the respondents by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondents, Rudolph L. DiTrapano, Attorney at Law, DiTrapano, Mitchell, Lawson and Field, 604 Virginia Street, East, Charleston, West Virginia 25301 and F. Paul Chambers, Attorney at Law, Jackson, Kelly, Holt & O'Farrell, 1500 One Valley Square, P. O. Box 553, Charleston, West Virginia 25322. I further certify that all parties required to be served have been served.

/s/ CLETUS B. HANLEY
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